Supreme Court, U.S.
FILED

(1)

CASE NO. 941808 MAY 3 - 1995
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

CHARLES RICHARD PIERCE,

Petitioner,

versus

SHIRLEY JEANETTE PIERCE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO
THE SUPREME COURT OF MISSISSIPPI

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

IS FOURTEENTH AMENDMENT DUE PROCESS VIOLATED BY STATE SUPREME COURT AFFIRMANCE OF A STATE COURT DIVORCE JUDGMENT AWARDING A FORMER SPOUSE FIFTY PERCENT OF A MILITARY RETIREE'S PENSION AS A VESTED ENTITLEMENT UNDER 10 U.S.C. §1408 WITHOUT A COMMUNITY PROPERTY LAW, PLEADINGS OR PROOFS TO SUPPORT SUCH AN AWARD?

PARTIES

The Petitioner is:

Charles Richard Pierce

The Respondent is:

Shirley Jeanette Pierce

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REFERENCE TO OFFICIAL REPORTS OF OPINIONS BELOW

The judgment sought to be reviewed was entered in the Mississippi Supreme Court and entitled:

IN THE SUPREME COURT OF MISSISSIPPI

NO. 91-CA-00809

CHARLES RICHARD PIERCE

V.

SHIRLEY JEANETTE PIERCE

The judgment reviewed by the Supreme Court of Mississippi was entered on the 2nd of August, 1991, and entitled:

IN THE CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI, FIRST JUDICIAL DISTRICT

CIVIL ACTION NO. 91,512

SHIRLEY JEANETTE PIERCE, Plaintiff,

versus

CHARLES RICHARD PIERCE, Defendant.

The official report is *Pierce v. Pierce*, 648 So. 2d 523 (Miss. 1995), rehearing denied on February 2, 1995.

The opinion is included in the Appendix at (A-1).

JURISDICTION

The judgment for which review is sought was entered October 13, 1994. Motion for Rehearing was denied on February 2, 1995.

The judgment for which review is sought is a final judgment of the highest court of the State of Mississippi where review could be sought and where the judgment turns upon substantial federal questions. Jurisdiction of the United States Supreme Court is pursuant to 28 United States Code, Section 1257.

The federal questions involved arise out of the interpretation and application of 10 USC §1408 (hereinafter FSPA) and a denial of due process in the application of FSPA in violation of the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

FEDERAL CONSTITUTIONAL PROVISIONS

FOURTEENTH AMENDMENT

Section 1

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Untied States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTES

10 United States Code, Section 1408 (full text in Appendix at A-45).

STATEMENT OF THE CASE

Shirley and Charles Pierce were married by proxy on May 25, 1967, while Shirley was in Virginia and Charles, then serving with the United States Navy, was stationed in Scotland (A 6, 17, 70). During their marriage, Charles was stationed at several locations including Virginia, Scotland, Florida, Maryland, Louisiana, California, Okinawa, Gulfport, Mississippi, and Long Beach, Mississippi. Shirley accompanied Charles on some but not all of his assignments. One child was born of the marriage, a daughter, who was over the age of twenty-one (21) and emancipated at the time of the divorce.

On December 15, 1987, Shirley filed a complaint for divorce in the First Judicial District of the Harrison County Chancery Court, and thereafter an Amended Complaint, seeking a divorce on the grounds of habitual cruel and inhuman treatment or, alternatively, irreconcilable differences (A 6, 17). In her amended complaint, Shirley asked for monetary support in the form of periodic alimony and lump sum alimony. Additionally, she requested fifty percent (50%) of Charles' military retirement income, asserting that she had a "vested" interest in his retirement pay of at least that amount pursuant to 10 U.S.C. §1408, the Federal Uniformed Services

Former Spouses' Protection Act (FSPA). It was in these initial pleadings that the vested 50% of Charles' military pay was first claimed under FSPA (A 73, 77). Charles filed an answer denying entitlement to the retirement fund and a counter complaint, seeking a divorce on the grounds of cruel and inhuman treatment, adultery, desertion, or, in the alternative, irreconcilable differences (A 81-88). Shirley answered the counter-complaint but sought no affirmative relief (A 90-94).

At trial, Shirley, by stipulation, dropped the request for periodic or lump sum alimony. However, she orally retained her right to seek 50% of Charles' retirement pay (A 106-109). Charles' attorney moved for a Rule 41(b) M.R.C.P. dismissal of Shirley's complaint at the conclusion of her case-in-chief (A 110-111). The chancellor granted the motion and dismissed Shirley's cause of action, finding that she failed to prove her grounds for divorce (A 28, 113).

After all the evidence had been presented, the chancellor granted Charles a divorce from Shirley on the ground of adultery, finding that she had engaged in an adulterous relationship. The chancellor ruled that each party was entitled to the use and possession of the personalty (i.e., household furnishings, tangible

goods, etc.) which they then had in their respective possession (A 35-39). Neither party was awarded attorney's fees. Shirley was not awarded periodic or lump sum alimony; however, she was granted a fifty percent (50%) interest in Charles' military retirement pay by the judgment which stated:

> ORDERED AND ADJUDGED that the Plaintiff be, and she is hereby granted a fifty percent (50%) interest in and to the military retirement of the Defendant pursuant to and in accordance with applicable provisions of 10 U.S.C. 1408, et seq., and that the Chancery Coutr [sic] Clerk be directed to provide a certified copy of this Judgment to the appropriate official for implementation of this order.
>
> (Emphasis supplied.)

The federal issue was first ruled upon in the judgment (A 37-38).

Charles moved for an opportunity to present additional law and argument to show Shirley had no vested right in the military retirement and that the record supported no theory upon which to base such an award (A 96-101). It was in this motion that due process lack of opportunity to be heard was first raised.

Charles moved for a new trial (A 102-104) but the chancellor denied Charles' motion for a new trial, or, in the alternative, a judgment notwithstanding the verdict (A 42-43, 125). In the oral argument on that motion, Charles argued that there were no

pleadings or proofs to support the award and that Mississippi was not a community property state (A 113-120; 123-125).

Charles appealed to the Supreme Court of Mississippi which, in a split decision, affirmed the fifty percent award of his military retirement with four justices concurring in that opinion by Justice Pittman (A 5-15) and four justices dissenting in two written opinions (A 16-31). Charles' motion for rehearing (A 134-137) was denied (A 32).

The majority opinion, review of which is sought, held that Shirley had no vested interest in Charles' military retirement (A 12) but nonetheless affirmed the award.

ARGUMENT

IS FOURTEENTH AMENDMENT DUE PROCESS VIOLATED BY STATE SUPREME COURT AFFIRMANCE OF A STATE COURT DIVORCE JUDGMENT AWARDING A FORMER SPOUSE FIFTY PERCENT OF A MILITARY RETIREE'S PENSION AS A VESTED ENTITLEMENT UNDER 10 U.S.C. §1408 WITHOUT A COMMUNITY PROPERTY LAW, PLEADINGS OR PROOFS TO SUPPORT SUCH AN AWARD?

Charles had no adequate opportunity to contest the award of one-half of his retirement which was made in violation of due process of law and upon a misapplication of FSPA (10 U.S.C. § 1408).

The reasons why are compelling. First, by stipulation during trial (A 91-94) Shirley waived any claim for alimony. Her claim for one-half of Charles' retirement was based upon an asserted vested right which did not exist under Mississippi law nor under FSPA. Her complaint was dismissed and no affirmative relief had been pled in response to Charles' counterclaim by way of affirmative defense (A 28, 90-93). Even if an amended pleading had been submitted, there was no factual proof or finding by the trial judge (chancellor) as required by Mississippi law, to support an equitable distribution theory of making the award and Mississippi is not a

Community property state. See *Dillon v. Dillon*, 498 So.2d 328 (Miss. 1986) and *Southern v. Glenn* , 568 So. 2d 281 (Miss. 1990).

It is apparent that the trial judge awarded the one-half interest on the erroneous assumption that FSPA authorized it as was asserted by Shirley's lawyer (A 73).

Had it been otherwise, it can be assumed that the trial judge would have made the required factual findings to support the award as an equitable distribution or proofs of vested entitlement arising in a state having community property law where the entitlement or applicable portions thereof were earned by Charles.

The legal effect of affirmance of the award was to approve an award of a non-existent vested interest, in a non-community property state, of military retirement without supporting pleadings or proofs pursuant to an erroneous application of 10 U.S.C. § 1408.

The opinion of the majority conceded that the Chancellor had apparently awarded the 50% of Charlie's retirement under the mistaken theory that Shirley had a vested 50% interest in the retirement fund (A 12-13).

However, without further ado, the majority held that the chancellor had made adequate findings of fact to support the award

as an equitable distribution (A 12-15). The alluded to finding was more of a conclusion which simply concluded that Shirley had followed Charles faithfully until their final separation (A 13). It appears that the majority concluded that the Chancellor made the right decision for the wrong reason.

This approach ignores the procedural due process problem with which Charles was faced after the award. Since Shirley had withdrawn all claims for alimony and back support while her amended complaint was yet before the Court, and then had her complaint dismissed with no claim for any relief whatsoever pending before the Court, Charles was entitled to assume that his military pension was no longer at issue.

Because of the withdrawal of all claims except that for Shirley's asserted 50% vested interest in the retirement, Charles had ceased his examination of Shirley (A 109, 115) relying also on the lack of proof relating to equitable distribution as required by Mississippi *Ferguson v. Ferguson*, 634 So. 2d 921 (Miss. 1994). Charles was entitled to feel he had won the day! After the judgment, Charles sought in vain (A 95-101) to present further argument, but was denied.

In the case of *Simanonok v. Simanonok*, 787 F.2d 1517 (11th Cir. 1986), retransferred after second appeal in *Simanonok v. Simanonok*, 918 F.2d 947 (Fed. Cir. 1990), a military retiree brought a Pro Per Title 42, § 1983 action asserting due process violations in the awarding of his military retirement to his former spouse in the state of California.

In reversing a lack of subject matter jurisdiction dismissal, the court stated:

> Because it is beyond peradventure that Government cannot take a portion of an individual's pay, pay to which he is statutorily entitled, and give it to another without at least complying with the requirements of due process, our task on appeal is simply to determine whether there is any merit whatsoever to these due process allegations.

This spotlights the national importance of this case in which Charles asserts that his pension was diminished without due process of law.

If the award had been made on equitable distribution grounds, the findings of the chancellor should have covered the guidelines set out in *Hemsley v. Hemsley*, 639 So. 2d 909 (Miss. 1994) and *Ferguson v. Ferguson*, 639 So. 2d 921 (Miss. 1994) as enumerated in the dissent of Justice Lee (A 16-27) as follows:

1. Substantial contribution to the accumulation of the property. Factors to be considered in determining contribution are as follows:

    a. Direct or indirect economic contribution to the acquisition of the property;

    b. Contribution to the stability and harmony of the marital and family relationships as measured by quality, quantity of time spent on family duties and duration of the marriage; and

    c. Contribution to the education, training or other accomplishment bearing on the earning power of the spouse accumulating the assets.

2. The degree to which each spouse has expended, withdrawn or otherwise disposed of marital assets and any prior distribution of such assets by agreement, decree or otherwise.

3. The market value and the emotional value of the assets subject to distribution.

4. The value of assets not ordinarily, absent equitable factors to the contrary, subject to such distribution, such as property brought to the marriage by the parties and property acquired by inheritance or inter vivos gift by or to an individual spouse;

5. Tax and other economic consequences, and contractual or legal consequences to third parties, of the proposed distribution;

6. The extent to which property division may, with the equity to both parties, be utilized to eliminate periodic payments and other potential sources of

future friction between the parties;

7. The needs of the parties for financial security with due regard to the combination of assets, income and earning capacity; and,

8. Any other factor which in equity should be considered.

Ferguson, 639 So. 2d at 928.

> In this case, the lower court, however, made absolutely no findings of fact as to Shirley's contributions to the accumulation of the retirement fund, other than that ***"[Mrs. Pierce] followed him faithfully"*** and ***"that Mrs. Pierce should be entitled . . ."***

(A 24-26)

The mistaken reasoning of the majority opinion becomes obvious upon close examination. After conceding the that Chancellor awarded the 50% of Charles' retirement on the erroneous assumption that Shirley was entitled to the 50% retirement as a vested right under the authority of FSPA (A 12) the majority opinion states:

> "Because the chancellor in the case ***sub judice*** has made adequate and specific findings with regard to the equitable distribution of the military retirement fund, we affirm."

(Emphasis supplied.)

This is ambiguous. If the Chancellor made the retirement fund

award under the mistaken theory that Shirley had a vested interest under FSPA, the Chancellor could hardly have made the alleged "findings with regard to . . . " [emphasis supplied] any equitable distribution.

It is therefore clear that the judgment of the Mississippi Supreme Court does not rest on adequate state grounds so as to preclude review by this Court. In *Staub v. Baxley*, 355 U.S. 313 (1958), this Court stated:

> Whether the constitutional rights asserted by the appellant were ". . . given due recognition by the [Court of Appeals] is a question as to which the [appellant is] entitled to invoke our judgment, and this [she has] done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support . . . [for] if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided." Ward v Love County, 253 US 17, 22, 64 L ed 751, 758, 40 S Ct 419, and cases cited.

Concerning due process, the dissenting opinion of Justice McRae went directly to that issue by pointing out that once Shirley's cause of action had been dismissed and she had neither requested affirmative relief in her answer to Charles' counterclaim

nor adopted the pleadings and prayer of her dismissed complaint as an affirmative defense, she had no claim for a share of the retirement fund (A 28-31).

That dissent contains the following:

> The reason behind requiring a complainant to plead her relief is to avoid a denial of due process. **Miller v. Miller**, 512 So. 2d 1288 (Miss. 1989).
>
> (Emphasis supplied.)

Then, referring to *Crowe v. Crowe*, 641 So. 2d 1100 (Miss. 1994), the dissent continues:

> Applying **Crowe**, Shirley's original prayer for relief was completely dismissed, and therefore, any relief being granted from the complaint cannot be justified. At the moment the chancellor dismissed Shirley's entire complaint, Charles proceeded on the assumption that the only issues left were those presented by his counterclaim which did not include a division of retirement benefits.
>
> Additional statements by this Court support a reversal of the chancellor's decision:
>
> > Every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled by the proof and which is within the jurisdiction of the court to grant, even if the party has not demanded such relief in his pleading . . . .
>
> **Smith v. Smith**, 607 So. 2d at 281.

> The final judgment in the Pierce case was granted in favor of Charles. It is his proof by which the relief should be granted since the chancellor may not make such an award without proper pleadings. **Diamond v. Diamond**, 403 So. 2d 129, 130-31 (Miss. 1981). It is for these foregoing reasons that I respectfully dissent.

Charles has been deprived of a 50% interest in his military retirement upon a mistaken interpretation of FSPA and a violation of his due process right to rely on the procedures and law established by the Mississippi Supreme Court but ignored by the majority.

Both the Fourteenth Amendment and 10 U.S.C. § 1408 are critically involved in this case in a recurring context throughout the country.

Accordingly, it is a matter of great national concern which deserves a full review by this Honorable Court. The Court should grant this petition and after due consideration set aside the erroneous judgment of the Supreme Court of Mississippi with directions to either order that Charles' pension cannot be subjected to Shirley's claims or order a new trial.

Respectfully submitted,

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